IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 36 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

KANAILAL NAGARDAS SHAH

Versus

SUMANBHAI KASTURCHAND SHAH

Appearance:

MS MAMTA VYAS FOR MR DD VYAS for Petitioner

MR JD AJMERA for Opponent

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 22/04/98

ORAL JUDGEMENT

The petitioner (original defendant in Regular Civil Suit No.210 of 1979) who succeeded before the trial court, but failed in appeal being Regular Civil Appeal No. 79 of 1981 preferred by the opponent (original plaintiff) in the District Court at Surendranagar, by this application calls in question the legality and validity of the judgment and decree dt. 11th September, 1984 passed by the then learned Assistant Judge at

Surendranagar in Regular Civil Appeal No.79 of 1981.

2. Sumanbhai Kasturchand Shah, the opponent in this revision application, filed Regular Civil Suit No.210 of 1979 in the Court of the Civil Judge (Senior Division) at Surendranagar to recover the amounts of rent that had become due and possession of the suit house let to the present petitioner alleging that near Railway Station at Surendranagar, his house bearing Block No.3 is situated in Kahanannagar Co-operative Housing Society (hereinafter referred to as the suit house). On the recommendation of Nagindas Fulchand, for some times, the suit house was let to the present petitioner at the monthly rent of Rs.100/-. The petitioner was under the terms of lease bound to make payment every month regularly, but did not accordingly made the payment from 1st March, 1979 till 31st August, 1979, and therefore, Rs.600/- had become due. His all the family members at Bombay cannot conveniently be accommodated, every one has been experiencing hardships. Some of the elder members in the family then thought it wise to shift to Surendranagar and settle at Surendranagar. The opponent, therefore, bonafide requires the possession of the suit house. The petitioner is also having his two houses- one opposite of Vanana Utara and another in Fulchandnagar in Surendanagar. Both the houses are quite specious and the petitioner can conveniently and comfortably accommodate him and his family members therein. The opponent, therefore, issued a notice on 21st March, 1979, but after being served with the notice, the petitioner neither vacated the suit house, nor made the payment of the rent amounts that had become due. With no option, therefore, the suit to recover possession of the suit house and amounts of rent, was filed.

3. The petitioner, after being served with the summons, appeared before the trial court and filed his written statement at Ex.10, wherein he denied every allegations levelled against him, and also submitted that the opponent was not the owner of the suit house. The learned Civil Judge (Senior Division) at Surendanagar then framed necessary issued at Ex.12. Appreciating the evidence on record, he held that the opponent was the owner of the suit house but failed to establish his case of bonafide requirement. He also held that case of suitable acquisition of another accommodation was not established, and no amount of rent was due. He then in view of such findings, dismissed the suit with costs, on 31st July, 1989. The opponent, being aggrieved by such judgment and decree, preferred Regular Civil Appeal No.79 of 1982 in the District Court at Surendranagar. That

appeal was assigned to the then learned Assistant Judge at Surendanagar for hearing and disposal in accordance with law. Hearing the parties on merits, the learned Assistant Judge held that the petitioner had acquired suitable residential accommodation and had also denied the title of the opponent. On both the counts, the opponent was,therefore, entitled to the decree of eviction. But as the learned trial Judge, according to him, fell into error on those points, the judgment and decree passed by the trial court were required to be set aside. It may be stated that the learned Assistant Judge agreed with the trial court on two other points holding that when nothing was due, the ground of non-payment of rent did not survive, and the case about bonafide requirement was not established. On both the issues, the trial court did not fall into error in refusing to pass the decree of eviction. He, then on the grounds of acquisition of suitable residence and disclaimer of title, passed the decree of eviction on 11th September 1984, reversing the decree passed by the trial court. The petitioner, feeling aggrieved by such decree, has preferred this revision application calling in question the legality and validity of the same.

4. Is is contended on behalf of the petitioner that the learned Assistant Judge at Surendanagar fell into error in appreciating the evidence on disclaimer of title and suitable acquisition of another accommodation. The law applicable is not correctly interpreted and overlooking the necessary ingredients of the provisions of Bombay Rent Act applicable, the learned Assistant Judge has misdirected himself; and drawing wrong conclusions, passed the decree which is required to be set aside. It may be, at this stage, stated that no one appeared on behalf of the opponent to submit, though the learned advocate representing the opponent was aware about the dates of hearing fixed before this court and had also once appeared on a previous day.

5. As the appeal is confined to only two points namely disclaimer of title and acquisition of another premises by the petitioner, I will not dwell upon other points. Firstly, I will be dealing with the question about disclaimer of title. It may be mentioned that after the opponent filed the suit, the petitioner appeared before the lower court and in the written statement, he raised the plea challenging the ownrship of the respondent stating that he was not admitting the ownership of the opponent over the suit house. Apart from the context in which the said plea is raised, and whether it would amount to disclaimer, if it is assumed

that there is a disclaimer of title on the part of the petitioner, the decree on that count ought not to have been passed. Reading Sec. 111 of the Transfer of Property Act, it clearly appears that the disclaimer of title for seeking the decree of eviction thereon must be before the suit to eject the lessee is filed. This is on the principle that the action must be based on something accruing before the suit and that principle or rule is well accepted in many cases. As per that law made clear, if the plea or point relating to disclaimer in the written statement is raised or after the suit is filed, the same is raised, it will not support a forfeiture or dispense with necessity for notice to quit. If the disclaimer is advanced in a previous suit, it would operate as disclaimer so as to support the subsequent suit for ejectment. The Supreme Court has however held in the case of MAJATI SUBBARAO v/s P.V.K.KRISHNA RAO BY LRS. AIR 1989 SUPREME COURT 2187 that a denial of title in the written statement cannot be taken advantage of in that very suit, but can be taken advantage of only in a subsequent suit to be filed by the landlord, would only lead to unnecessary multiplicity of proceedings, as the landlord would be obliged to file a second suit for ejectment of the tenant on the ground of forfeiture entailed by the tenant's denial of his character as a tenant in the written statement. The plaint or suit in that event be amended so as to incorporate the ground of denial of title for the relief on that ground. The Supreme Court has thus made it clear that to constitute a ground of eviction, the disclaimer of title must be anterior to the filing of the eviction petition, but to avoid multiplicity of proceedings, it further held that the advantage of the disclaimer made in that very suit can be availed of, provided the plaint is amended, seeking necessary order and the ground of disclaimer of title is incorporated in the case advanced in plaint.

6. In the case on hand, for the first time, the petitioner denied the title of the opponent in the written statement, he filed in the suit after being served with the summons. Before the suit was filed, he had not come out with the case of disclaimer of title. In this case, therefore, the disclaimer is not anterior to the filing of the suit for eviction, and therefore, that ground is not available to the petitioner to seek the decree of eviction. It may be stated that in view of the Supreme Court decision (supra), the opponent could have availed of the ground of disclaimer for seeking the decree of eviction after getting the plaint amended and setting up thereby the case of disclaimer, but that is not done. When the plaint is not got amended and the

ground of disclaimer is not put forth in the plaint at this stage or even at the appellate stage before the District Court, it was not open to the opponent to seek the decree of eviction on that count. The trial court, therefore, on the ground of disclaimer of title, rightly refused to pass the decree. The learned Assistant Judge overlooked this position of law and misdirected himself in appreciating the evidence. His finding on that point being contrary to law is required to be interefered with. In short, there was for him, no justification to set aside the decree of the trial court.

7. I will not switch over to another ground on which the learned Assistant Judge has preferred to pass the decree of eviction and it is acquisition of suitable premises by the petitioner. No doubt, vide Sec.13(1)(l) of the Bombay Rents Hostel and Lodging House Rates Control Act, it is open to the landlord to seek the decree of eviction, if he establishes that after coming into operation of this Act, the tenant has either built or acquired vacant possession of or being allotted a suitable residence. A careful perusal of this provision reveals and especially the word "tenant" used therein, envisages that the person after becoming the tenant i.e. taking the premises on lease, must have acquired vacant possession of the suitable residence. If prior to hiring of the premises, he acquires, he is not the tenant of any of the premises, and therefore, if he has acquired vacant possession of other suitable residence, prior to hiring of the premises or taking other premises on lease, he being not the tenant, the provision of Sec. 13(1)(l) of the Bombay Rent Act would not come into play, and the landlord, in that case, cannot claim a decree of eviction. I have gone through the oral as well as documentary evidence on record and found that the opponent is the owner of the two houses, one situated opposite to Vanana Utara and another within the local limits of the area called Fulchandnagar. According to the petitioner, these two houses belong to the joint family of which he is the member, and he is having his share. When he hired the suit premises, these two houses were very much, accordingly to him, owned by him. There is nothing on record going to show that the petitioner acquired these two houses after he hired the suit house. When such is the case, decree of eviction on the ground of acquisition of the suitable residence ought not to have been passed. The learned Judge has also on this point overlooking the legal position, misdirected himself in appreciating the evidence and erroneously held that the petitioner had acquired another suitable premises for his residence. When accordingly the error of law has

been committed, the decree passed on that count is also required to be set aside.

8. So far as other two grounds are concerned namely arrears of rent and bonafide requirement, no submissions are made and the decree passed by the learned Assistant Judge at Surendranagar is not assailed on those two grounds. When accordingly, I am not called upon to dissect merits on those grounds, it would not be necessary to deal with the same. Suffice it to say that on those two grounds, both the courts have refused to pass the decree of eviction, and on the aforesaid two grounds also, the opponent fails to have the decree of eviction. The judgment and decree passed by the learned Assistant Judge at Surendranagar, therefore, are required to be set aside, and the suit filed by the opponent is required to be dismissed.

9. For the aforesaid reasons, the Civil Revision Application is allowed. The judgment and decree passed by the learned Assistant Judge at Surendranagar in Regular Civil Appeal No.79 of 1981 are hereby set aside, and the judgment and decree passed by the trial court, dismissing the suit are hereby restored. No costs in the circumstances. Interim relief granted is hereby vacated. Rule accordingly made absolute.

Date: 22/4/1998. -----
(ccs)